BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

OLIVER BRIDGES	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,001,777
HECKERT CONSTRUCTION COMPANY, INC.	)	
Respondent	)	
AND	)	
	)	
BUILDERS' ASSOCIATION	)	
SELF-INSURERS' FUND	)	
Insurance Fund	)	

ORDER

Respondent and its insurance fund appealed the May 29, 2003 Award entered by Administrative Law Judge Jon L. Frobish. The Board heard oral argument on November 13, 2003.

APPEARANCES

E. L. Lee Kinch of Wichita, Kansas, appeared for claimant. Wade A. Dorothy of Lenexa, Kansas, appeared for respondent and its insurance fund.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a November 13, 2001 accident and resulting low back injury. In the May 29, 2003 Award, Judge Frobish determined claimant had a 100 percent wage loss and a 47 percent task loss, which created a 73.5 percent permanent partial general disability. The Judge also found respondent had failed to accommodate claimant's permanent back injury and that claimant remained unemployed despite making a good faith effort to find other work.

Respondent and its insurance fund contend Judge Frobish erred. They argue respondent was providing claimant with accommodated employment and that claimant quit his job when he left work early on December 11, 2002. In the alternative, they argue claimant demonstrated gross insubordination on December 11, 2002, which constituted just cause for his termination. Accordingly, respondent and its insurance fund request the Board to decrease claimant's permanent partial general disability to 7.5 percent, which is an average of the whole body functional impairment ratings provided by Dr. Jane Drazek and Dr. Paul Stein.

Conversely, claimant contends he did not quit his job. Instead, claimant argues the job assignment that he left, operating an asphalt roller, violated his medical restrictions as it required excessive bending and twisting, did not permit him to alternate sitting and standing and entailed considerable vibration. Claimant argues he had a 58 percent wage loss up to December 16, 2002, followed by a 100 percent wage loss. Claimant also argues he sustained a 47 percent task loss, which creates a 52.5 percent permanent partial general disability to December 16, 2002, followed by a 73.5 percent permanent partial general disability.

The only issue before the Board on this appeal is the extent of claimant's permanent partial general disability.

FINDINGS OF FACT

After reviewing the entire record and after considering the parties' arguments, the Board finds, as follows:

1. Claimant, who was born in November 1946, is a United States Marine Corps veteran and a truck driver with approximately 30 years experience. On November 13, 2001, claimant injured his back while chaining down a Caterpillar loader. At the time of the accident, claimant was performing his duties as an equipment hauler. The parties stipulated that claimant's accident arose out of and in the course of his employment with the respondent, which is a general highway contractor that claimant began working for in April 2001.

2. Claimant has a history of low back problems, which commenced in 1980 when he underwent the first of four low back surgeries. In 1986 he underwent a laminectomy and in 1987 his low back was fused. Claimant's most recent low back surgery occurred in 1996 when he had an L4-5 laminectomy. In total, claimant had undergone four low back surgeries before commencing work with respondent. Despite those surgeries, before commencing work for respondent claimant passed his Department of Transportation physical. Moreover, when claimant began working

for respondent, to his knowledge he had no permanent work restrictions or limitations.

3. The day following the November 13, 2001 accident, claimant began receiving medical treatment for his low back injury. Claimant missed work from November 14, 2001, to January 7, 2002, when he returned to work for respondent driving a dump truck. Although claimant initially experienced pain going down into his right leg following the November 2001 accident, while driving the dump truck claimant also began experiencing pain going down into his left leg. During January 2002, claimant periodically missed work before being restricted from driving a truck and before being reassigned in early February 2002 to work in respondent's shop. Later, respondent assigned claimant to work on a flag crew, which was the job that claimant was performing in late April 2002 when he reported to a hospital emergency room for severe back pain caused by prolonged standing. Claimant, on other occasions, also drove a pilot car but eventually was reassigned to driving a dump truck and a tractor-trailer.

4. On August 8, 2002, claimant saw board-certified neurosurgeon Dr. Paul Stein. Claimant initially saw the doctor pursuant to Judge Frobish's order but the parties later agreed that Dr. Stein would be claimant's authorized doctor. Dr. Stein diagnosed "lumbar disk with radiculopathy irritation."[1] At their initial meeting, the doctor noted claimant was continuing to work but he had to leave work early and would not complete a full day or full week of work. The doctor also noted that claimant was taking eight medications: Vicoprofin, Neurontin, hydrocodone/AP AP, diazepam, amitriptyline, Vioxx, Bextra and desipramine.[2]

5. Claimant continued working for respondent. On November 12, 2002, Dr. Jane Drazek evaluated claimant at his attorney's request. The doctor noted claimant was having difficulty driving due to his ongoing pain. Moreover, the doctor noted claimant was "barely able to work full time."[3] Dr. Drazek then recommended work restrictions for claimant, as set forth in her November 12, 2002 letter to claimant's attorney:

> As he [claimant] continues to show significant limitation of mobility I do not feel that he would be capable of activities which would require bending, twisting or turning on other than an occasional

[1] Stein Depo. at 7.

[2] *Id.*, Ex. 3 at 2, 4.

[3] Drazek Depo., Ex. 1 at 4.

> basis. It is also my impression that he would be poorly tolerant of activities requiring prolonged sitting. The vibratory stress of truck driving should be avoided as much as possible. I would recommend that lifting be limited to no greater than 25-30 lbs on an occasional basis and 10 to 15 lbs on a more frequent basis. Repetitive lifting, however, should be avoided. I would also recommend that Mr. Bridges be allowed to alternate sit and stand on an as-tolerated basis.[4]

6. Claimant's attorney forwarded a copy of Dr. Drazek's November 12, 2002 report to Dr. Stein. On November 25, 2002, Dr. Stein wrote claimant's attorney stating that he did not disagree with Dr. Drazek's recommended work restrictions.

7. On December 10, 2002, claimant advised respondent of his medical restrictions. Respondent then assigned claimant to operate an asphalt roller near Globe, Kansas, which was almost 200 miles away. After reporting to work on December 11, 2002, and after operating the roller for approximately two and one-half hours, claimant reported to his supervisor that he could not operate the machine due to his back pain. Claimant testified, in part:

> Q. (Mr. Kinch) What happened? Did you go?
>
> A. (Claimant) I made the trip to Gove *[sic]*, Kansas, which is a -- to the job site from there is 195 miles. I was there at 8:00 o'clock *[sic]*. And I know how to drive a roller, but as far as operating it to roll out asphalt, I am not an operator. And I had to have somebody show me how to do this. And at this time I am standing on this roller and it's twisting and turning and it almost throws you off when you cross over the humps in the road. And I just couldn't -- the pain was too bad, I couldn't stay on the roller.
>
> . . . .
>
> Q. In what way did this work violate those restrictions?
>
> A. Too much bending and twisting, climbing up and down on the roller too much. I couldn't sit or stand, alternate sitting and standing is *[sic]* needed. This particular roller, once you got off the seat, it quits running. You have to stay seated in the seat constantly for it to run.[5]

---

[4] *Id.*, Ex. 1 at 6-7.

[5] R.H. Trans. at 34-36.

8. James McManis, who was the temporary foreman at the job site when claimant left work on December 11, 2002, testified that claimant operated the asphalt roller about two hours before advising that his back hurt. Mr. McManis testified, in part:

> Mr. Bridges came off the roller and came across the -- came across the road and asked who was in charge. I heard him ask Adam that. I was from me to you, but up on the paver. I stepped down and he said his back was hurting and "Fuck this place, this shit isn't worth it." And I took that as a, you know, he couldn't do it. Didn't want to do it or whatever.[6]

9. On December 11, 2002, on the way home from Globe, Kansas, claimant attempted to call respondent's owner on his cell phone to report that he could not operate the roller. When claimant arrived home, he again called respondent's co-owner and president, Roger Heckert, and left messages requesting him to call. The next day, December 12, 2002, claimant again called and left a message for Mr. Heckert. But neither Mr. Heckert nor any other representative from respondent returned claimant's telephone calls.

10. In addition to the various telephone calls, claimant also wrote Mr. Heckert. In a letter dated December 11, 2002, claimant advised Mr. Heckert that he was unable to operate the asphalt roller as it caused unbearable pain. Claimant, in closing, requested a different job assignment that would be more appropriate in light of his work restrictions. On December 13, 2002, claimant wrote Mr. Heckert another letter to advise that he was available for work that did not violate his medical restrictions.

11. On December 16, 2002, respondent replied to claimant's telephone calls and letters. On that date, Mr. Heckert wrote claimant stating that the company concluded claimant had quit his job. Mr. Heckert's letter stated:

> In response to your letters of December 11 & 13, Heckert Construction Company is of the opinion your employment with us was self-terminated at the time you told Mr. McManis "Fuck this place, this shit isn't worth it" and left the project.[7]

Claimant promptly responded to that letter as he wrote Mr. Heckert on December 17, 2002, denying that he quit his job and denying that he made the alleged profane

[6] McManis Depo. at 13-14.

[7] R.H. Trans., Cl. Ex. 5.

statement. Claimant, in closing, again stated that he was available to perform any work that did not violate his medical restrictions.

12. Respondent did not reply to claimant's December 17, 2002 request to return to work. When he testified at the February 11, 2003 regular hearing, claimant was unemployed despite his attempts to find other work. At that hearing, claimant introduced a list of 24 contacts that he had made regarding employment from December 18, 2002, through February 6, 2003.

13. The parties stipulated claimant's pre-injury wage was $725.20 per week. As claimant's base rate was $11.50 per hour, overtime earnings comprised a considerable portion of that pre-injury wage. When claimant returned to work after the November 2001 accident, he continued to earn $11.50 per hour straight time but received minimal overtime.

14. Mr. Heckert testified claimant earned $11.50 per hour both before and after the November 2001 accident. According to documents introduced at Mr. Heckert's deposition, claimant earned $14,643.02 for the period that he worked from January 7, 2002, through December 7, 2002, which yields a weekly average of $305.96 per week. According to Mr. Heckert, there were 108 days during that period which claimant could have worked but did not for reasons unknown to respondent.

15. Mr. Heckert was in Texas when claimant left the job site on December 11, 2002. However, when he later learned that claimant had left the job, Mr. Heckert concluded claimant had quit. When Mr. Heckert received claimant's December 2002 letters, he did not read them as requests for appropriate work. The Board finds this testimony incredulous.

16. Both Dr. Drazek and Dr. Stein testified in this claim. Using the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (4th ed.), Dr. Drazek concluded claimant had a 14 percent whole body functional impairment before the November 2001 accident and that he sustained an additional five percent whole body functional impairment due to the November 2001 accident. Additionally, Dr. Drazek concluded claimant had lost the ability to perform 8 of the 17 (or 47 percent) work tasks that he performed in the 15-year period before the November 2001 accident, as identified by vocational rehabilitation counselor James Molski. Nonetheless, Dr. Drazek believed claimant might be able to return to driving a truck under certain circumstances as long as the job required neither prolonged sitting, nor lifting, fastening chains or other intense physical activities.

17. On the other hand, Dr. Stein, who also utilized the AMA *Guides* (4th ed.) concluded claimant sustained an additional 10 percent whole body functional impairment due

to the November 2001 accident. Dr. Stein did not provide an opinion regarding the extent of claimant's functional impairment immediately before the November 2001 accident. Moreover, Dr. Stein concluded claimant had lost the ability to perform nine of his 17 (or 53 percent) former work tasks.

18. Averaging the functional impairment ratings provided by Dr. Drazek and Dr. Stein, the Board finds claimant has sustained a 7.5 percent whole body functional impairment due to the November 2001 work-related accident.

CONCLUSIONS OF LAW

Because claimant has sustained a back injury, his permanent disability benefits are governed by K.S.A. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. **Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.** An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

But that statute must be read in light of *Foulk*[8] and *Copeland*.[9] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability

[8] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[9] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wages being earned when the worker failed to make a good faith effort to find appropriate employment after recovering from a work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[10]

The Kansas Court of Appeals in *Watson*[11] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[12]

In short, a worker is not permitted to manipulate his or her post-injury wage and, thus, manipulate the award of permanent partial general disability benefits. This Board has also interpreted the law to require an injured worker to make a good faith effort to retain employment.

The Board affirms the Judge's finding that claimant was justified in leaving the work site when he could not operate the asphalt roller without experiencing pain. The Board concludes that it is more probably true than not that operating the asphalt roller violated his permanent work restrictions, which both Dr. Drazek and Dr. Stein concluded were appropriate. Claimant then attempted to contact Mr. Heckert by telephone numerous times but failed. Claimant also immediately wrote Mr. Heckert to advise of his difficulties in operating the asphalt machine and requesting different work. Under these facts, the Board concludes that claimant made a good faith effort to retain his employment with respondent.

---

[10] *Id.* at 320.

[11] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[12] *Id.* at Syl. ¶ 4.

On the other hand, the Board finds that respondent did not exercise good faith when it failed to promptly return claimant's telephone calls or his December 11 and 13, 2002 letters. Moreover, the Board finds it incredulous that Mr. Heckert did not construe claimant's December 2002 letters as requests to return to work.

Furthermore, the Board finds claimant's testimony credible that he did not use the alleged profane language when he left the work site on December 11, 2002. For purposes of argument, in the event that claimant did utter the alleged profanity, under these circumstances that alleged language would not prevent claimant from receiving an award for a work disability (a permanent partial general disability greater than the functional impairment rating). First, claimant was not terminated for using foul language. Conversely, there is some evidence in the record to indicate that respondent's employees are not terminated for using such language.[13] Secondly, in the present context, there is no showing that the alleged language constituted insubordination, even if it had been uttered. There is no indication that the alleged language offended, berated or insulted anyone, that it disrupted the work site, that it was something other than the ordinary parlance of that work crew, or that it was uttered as a threat.

Claimant is entitled to an award for a work disability.

For the period that claimant is entitled to permanent partial general disability benefits between January 7 and December 11, 2002, claimant has a 58 percent wage loss, which is derived by comparing claimant's stipulated $725.20 pre-injury average weekly wage to the $305.96 per week that claimant averaged during that period.

The Board rejects respondent and its insurance fund's argument that claimant's actual post-injury wage should be increased by a sum representing 108 days that claimant allegedly did not work for reasons unknown to respondent. Considering all the evidence, including the medical notes from Dr. Drazek and Dr. Stein indicating that claimant was hardly able to work on a full-time basis and that he often left work early and was unable to complete a full workweek, the Board finds that claimant was not manipulating his post-injury earnings for unfair gain in this claim. Conversely, as indicated above, the Board has concluded that claimant has made a good faith effort to obtain and retain employment and, therefore, claimant's actual wages should be used in calculating his permanent partial general disability.

As indicated above, the medical evidence establishes that claimant has lost between 47 and 53 percent of his ability to perform the work tasks that he performed in the 15-year period before the November 2001 accident. Accordingly, the Board concludes

[13] See McManis Depo. at 16.

claimant has sustained a 50 percent task loss for purposes of the permanent partial general disability formula. Averaging the 50 percent task loss with the 58 percent actual wage loss yields a 54 percent permanent partial general disability to December 11, 2002.

Commencing December 11, 2002, claimant's actual wage loss increased to 100 percent as he was unable to find work despite a good faith effort to find other work. Accordingly, as of that date claimant's permanent partial general disability increased to 75 percent, which is an average of the 50 percent task loss and the 100 percent wage loss.

Nonetheless, the Workers Compensation Act provides that awards for permanent disability should be reduced by the amount of preexisting functional impairment when the injury aggravates a preexisting condition. The Act reads:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[14]

And functional impairment is defined by K.S.A. 44-510e, as quoted above.

Claimant's November 2001 accident aggravated his low back, which had been previously operated. Dr. Drazek's testimony established that as a result of claimant's earlier low back injuries and surgeries, immediately before the November 2001 accident claimant had a 14 percent whole body functional impairment. Consequently, claimant's award of permanent partial general disability benefits should be reduced by 14 percent. Accordingly, claimant's award of permanent partial general disability benefits for the period up to December 11, 2002, is reduced from 54 percent to 40 percent and the award of permanent partial general disability benefits commencing December 11, 2002, is decreased from 75 percent to 61 percent.

When claimant obtains employment or other circumstances warrant, the parties may request to review and modify this award as provided by the Act.

AWARD

WHEREFORE, the Board modifies the May 29, 2003 Award, as follows:

Oliver Bridges is granted compensation from Heckert Construction Company, Inc., and its insurance fund for a November 13, 2001 accident and resulting disability. Based

[14] K.S.A. 44-501(c).

upon an average weekly wage of $725.20, Mr. Bridges is entitled to receive 7.71 weeks of temporary total disability benefits at $417 per week, or $3,215.07.

For the period ending December 10, 2002, Mr. Bridges is entitled to receive 48.29 weeks of permanent partial general disability benefits at $417 per week, or $20,136.93, for a 40 percent permanent partial general disability.

For the period commencing December 11, 2002, Mr. Bridges is entitled to receive 183.81 weeks of permanent partial general disability benefits at $417 per week, or $76,648, for a 61 percent permanent partial general disability and a total award not to exceed $100,000.

As of November 20, 2003, Mr. Bridges is entitled to receive 7.71 weeks of temporary total disability compensation at $417 per week in the sum of $3,215.07, plus 97.58 weeks of permanent partial general disability compensation at $417 per week in the sum of $40,690.86, for a total due and owing of $43,905.93, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $56,094.07 shall be paid at $417 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: E. L. Lee Kinch, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Fund
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director